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No. 99-677

In the Supreme Court of the United States

WATERVIEW MANAGEMENT COMPANY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the proceedings before the district court violated petitioner's right to due process and to a jury trial.

2. Whether the court of appeals erred in affirming the district court's calculation of the damages owed petitioner for the Federal Deposit Insurance Corporation's repudiation of petitioner's option to purchase one parcel of land, where that calculation excluded alleged damages to an adjacent parcel of land that petitioner did not own on the relevant date.

3. Whether alleged anomalies in the proceedings before the court of appeals warrant exercise of this Court's "supervisory power."

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OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 3a-5a) is unpublished, but the decision is noted at 194 F.3d 175 (Table). The orders of the district court (Pet. App. 54a-55a, 64a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 20, 1999. A petition for rehearing was denied on July 22, 1999 (Pet. App. 6a). The petition for a writ of certiorari was filed on October 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the repudiation by the Federal Deposit Insurance Corporation (FDIC)[1] of an agreement containing a purchase option, held by petitioner Waterview Management Company, relating to one of two separate parcels of property that were to be included in a proposed real estate development project know as PortAmerica. Pet. App. 3a.

One of the parcels, known as the Riverfront Tract, was owned by PortAmerica Associates, a Maryland partnership, and was subject to a first trust note held by HomeFed Bank, F.S.B. *Waterview Mgmt. Co.* v. *FDIC*, 105 F.3d 696, 698 (D.C. Cir. 1997). When the first trust loan went into default, a workout agreement among the parties permitted HomeFed Bank to take title to the Riverfront Tract through foreclosure, required the incorporation of petitioner, and granted petitioner a three-year option, subject to certain conditions, to purchase the Riverfront Tract for $17.5 million. *Ibid.* Petitioner and PortAmerica Associates had principals in common but were separate legal entities. Pet. App. 4a. The other parcel in the project, known as the Beltway Tract, was separately owned by PortAmerica Associates and was subject to a first trust note held by Signet Bank.

On July 6, 1992, the FDIC was appointed receiver for HomeFed Bank. *Waterview*, 105 F.3d at 698. Petitioner sued the FDIC after the FDIC advertised the Riverfront Tract for sale in its 1993 Winter/Spring Land Catalogue. *Ibid.* The district court dismissed the

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[1] Although the Resolution Trust Corporation (RTC) was deemed to have repudiated the agreement, the FDIC succeeded to the RTC's interest under 12 U.S.C. 1441a(m)(1). All references in this brief are to the FDIC.

action. The court of appeals reversed, holding that the FDIC had repudiated petitioner's purchase option on the Riverfront Tract when it advertised the tract for public sale. The court therefore remanded to the district court for a determination of whether petitioner was owed "actual direct compensatory damages" under 12 U.S.C. 1821(e)(3)(A)(i) for the FDIC's repudiation of the purchase option. *Waterview*, 105 F.3d at 702; see Pet. App. 3a-4a.

2. On remand, the district court determined that "actual direct compensatory damages" would be measured by the difference between the purchase option price and the fair market value of the Riverfront Tract as of the date of receivership, July 6, 1992. Pet. App. 54a, 64a. The district court conducted a jury trial to compute the damages owed to petitioner. *Id.* at 3a.

James T. Lewis, a principal of petitioner and PortAmerica Associates, testified that on the date of receivership, petitioner owned the option to purchase the Riverfront Tract, while PortAmerica Associates owned the Beltway Tract. In testimony concerning the fair market value of the Riverfront Tract, the FDIC appraisal expert valued the property as would an uninterested third party purchaser, assuming that the separate owners of the Riverfront Tract and Beltway Tract would cooperate with each other only if it was in each owner's individual economic interest. Pet. App. 4a, 53a. Petitioner did not object to the admission of the FDIC appraisal expert's testimony. At the conclusion of the trial, the jury found the fair market value of the Riverfront Tract to be $20 million. This figure was between the figures offered by the FDIC's appraisal expert ($12 million) and petitioner's expert ($36 million). Pet. 9-10. After deducting the $17.5 million option price, the district court entered judgment for

petitioner in the amount of $2.5 million, plus interest. Pet. 10.

3. The court of appeals affirmed in an unpublished memorandum. Pet. App. 1a-5a. The court held that petitioner was not entitled to recover damages for the loss of value to the Beltway Tract because petitioner "did not own that property at the time of repudiation—another company did."[2] *Id.* at 4a. Although the court recognized that petitioner and PortAmerica Associates had principal investors in common, it held that the entities were legally distinct and that petitioner could not recover damages for the loss of value to property it did not own. *Ibid.* Similarly, the court rejected petitioner's argument that the district court erred in "permitting the jury to determine the value of the Waterfront Tract as if its owner were unrelated to the owner of the Beltway Tract." *Ibid.* The court held that the FDIC appraisal expert properly assumed that, under a fair market value analysis, the owners of the two tracts would have dealt with each other at arm's length. *Ibid.*

ARGUMENT

Petitioner contends that the proceedings before the district court violated his rights under the Fifth and Seventh Amendments. Petitioner further argues that the court of appeals erred in affirming the district court's determination to exclude any alleged loss in value to the Beltway Tract when calculating the damages owed as a result of the FDIC's repudiation of petitioner's option to purchase the Riverfront Tract.

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[2] Although the court of appeals referred to the "time of repudiation," the context of the reference confirms (and petitioner agrees, Pet. 17) that the court meant to refer to—and based its decision on—the date receivership commenced.

Finally, petitioner contends that alleged anomalies in the proceedings before the court of appeals warrant the exercise of this Court's "supervisory power." Petitioner's claims are without merit, and warrant no further review.

1. Prior to the commencement of the jury trial in this case, the district court held that the damages petitioner was entitled to recover under 12 U.S.C. 1821(e)(3) would not include any alleged loss in value to the Beltway Tract. Pet. App. 54a-55a, 64a-65a. Petitioner contends (Pet. 12-13, 15-16) that the district court's ruling violated its rights to due process and a jury trial. That claim has no merit. Petitioner and the FDIC both submitted papers in the district court addressing the propriety of including alleged damages to the Beltway Tract. After reviewing those submissions, the district court held that under 12 U.S.C. 1821(e)(3), petitioner was entitled to recover only "actual direct compensatory damages" caused by the FDIC's repudiation of the purchase option, Pet. App. 54a (quoting 12 U.S.C. 1821(e)(3)(A)(i)), and that such damages would be confined to the Riverfront Tract. *Id.* at 64a. Petitioner then reasserted its arguments on this point in its motion for reconsideration, and the district court rejected them in denying the motion. Nothing in that procedure violated petitioner's Fifth Amendment right to due process.

Contrary to petitioner's assertions (Pet. 16), this case does not present a conflict with the Fifth Circuit's decision in *United States* v. *8.41 Acres of Land, More or Less, Situated in Orange County*, 680 F.2d 388 (1982). That case involved the calculation of constitutionally mandated just compensation for a taking by the government, not the determination of statutory repudiation

damages under 12 U.S.C. 1821(e)(3).[3] Moreover, *8.41 Acres* held only that "due process requires that the owners be given an opportunity to be heard on the issue of compensation." 60 F.2d at 395. In this case, the district court permitted petitioner to present arguments concerning the propriety of including damages to the Beltway Tract. Thus, petitioner was afforded an opportunity to be heard as required by *8.41 Acres*. Moreover, because the issue of whether 12 U.S.C. 1821(e)(3) permits the inclusion of losses in value to the Beltway Tract is a question of law, it was appropriately addressed by the district court and not by the jury. See *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 387 (1996) (noting that "it [is] for the court to 'lay down to the jury the law which should govern them'") (quoting *Tucker* v. *Spalding*, 80 U.S. 453, 455 (1871)).

2. a. Petitioner next contends (Pet. 17-22) that the district court's application of the traditional measure of damages for the breach of an option to purchase land—the difference between the option price for the Riverfront Tract and the fair market value of that tract—conflicts with this Court's decision in *Olson* v. *United States*, 292 U.S. 246 (1934). At bottom, petitioner's argument is that, because it hoped to develop the Riverfront and Beltway Tracts in tandem, *Olson* mandates that the district court should have ruled, as a matter of law, that the jury was precluded from determining the fair market value of the Riverfront Tract as if its owner were unrelated to the owner of the Beltway Tract. Petitioner is incorrect.

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[3] The decisions of this Court cited in *8.41 Acres* (*United States* v. *Reynolds*, 397 U.S. 14 (1970), and *Bragg* v. *Weaver*, 251 U.S. 57 (1919)) are equally inapplicable because they involve government takings.

Olson addressed the compensation owed to property owners after the United States condemned their land for use as a reservoir. The Court held that considerations of an individual owner's subjective expectations should be excluded from a determination of the property's fair market value, which it defined as the "amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." *Olson*, 292 U.S. at 257. *Olson*'s description of fair market value is entirely consistent with the application of the concept in this case. Petitioner may have hoped to develop the Riverfront Tract together with the Beltway Tract, but the FDIC repudiated petitioner's purchase option only on the Riverfront Tract, and the district court properly permitted the jury to rely on an objective assessment of the Riverfront Tract's "market value" when determining petitioner's damages as a result of the repudiation. *Id.* at 255.[4]

In contrast, petitioner's "subjective" approach to fair market value is both unsupported and unworkable. As the court of appeals noted, "[t]o compute value on [petitioner's] theory would require a determination of

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[4] Petitioner's argument (Pet. 13-14) that the district court erred in finding that the statutory measure of damages does not include "consequential" damages is not appropriate for this Court's review, as the argument was neither raised nor decided in the court of appeals. See *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 94 n.18 (1989); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Moreover, petitioner's claim of consequential damages flowing from the lost opportunity to develop the Riverfront and Beltway Tracts together is foreclosed by 12 U.S.C. 1821(e)(3)(B)(ii), which excludes "damages for lost profits or opportunity" from the "actual direct compensatory" damages that are payable under 12 U.S.C. 1821(e)(3)(A).

the extent to which the Beltway owner would have been willing to bear costs in excess of those a rational, self-interested owner would have borne. There was no basis for the jury to make such a determination other than speculation." Pet. App. 4a.

b. Petitioner also maintains (Pet. 24) that the court of appeals improperly affirmed on a basis not addressed by the district court, namely that PortAmerica owned the Beltway Tract on the date the receivership began, and that petitioner and PortAmerica are separate business entities. An appellate court, however, may affirm a lower court judgment on any ground supported by the law and the record. *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984); *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982). Record evidence establishes that on July 6, 1992 (the date of the receivership), the option to purchase the Riverfront Tract was owned by petitioner (a Virginia corporation), while the fee simple interest in the Beltway Tract was held by PortAmerica (a Maryland partnership).[5] See C.A. App. 46, 169, 177. Petitioner cites no authority for the proposition that a claimant seeking "actual direct compensatory damages" pursuant to 12 U.S.C. 1821(e)(3)(A)(i) may receive payment for alleged damages to property the claimant does not own. Thus, the court of appeals correctly held that petitioner could not "assert a claim for damages to the Beltway Tract because it did not own that property"

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[5] Relying on a state takings case, petitioner contends (Pet. 17) that the court of appeals erred in finding that petitioner and PortAmerica Associates were separate entities. Petitioner identifies no conflict among the federal courts of appeals on the separate entity issue under 12 U.S.C. 1821(e)(3). The fact that some States may have developed differing state law approaches to the issue is not problematic, and certainly does not occasion this Court's review.

when the receivership of the Riverfront Tract began. Pet. App. 4a.

Petitioner maintains (Pet. 16-17), however, that the court of appeals erred in determining the ownership of the Beltway Tract on the date of receivership rather than on the later date of repudiation. Petitioner claims that it owned an option to purchase the Beltway Tract by the date of repudiation, and implies that it should be eligible for damages to the Beltway Tract as of that date. Petitioner is incorrect.

Assuming, arguendo, that petitioner did own an option to purchase the Beltway Tract by the time the FDIC repudiated the option to purchase the Riverfront Tract,[6] the court of appeals was correct to hold that alleged damages to the Beltway Tract were properly excluded. Under 12 U.S.C. 1821(e)(3)(A)(i), the receiver's liability for the repudiation of a purchase option contract is "determined as of * * * (I) the date of the appointment of the conservator or receiver." See *Office & Prof'l Employees Int'l Union* v. *FDIC*, 27 F.3d 598, 601-602 (D.C. Cir. 1994) (*OPEIU*) (holding that the FDIC's repudiation relates back to the date of receivership, and that repudiation damages are assessed with reference to the receivership date). Section 1821(e)(3) preserves the rights of property holders at the time of the receivership, and does not recognize the acquisition of new rights after that time. See *id.* at 604-605. Petitioner acquired a purchase option on the Beltway Tract after the receivership of the Riverfront Tract had begun, and was thus on notice that the FDIC had statutory authority to repudiate the purchase option on

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[6] Petitioner cites no record evidence establishing that it owned an option to purchase the Beltway Tract at the precise time its option to purchase the Riverfront Tract was repudiated.

the Riverfront Tract. Petitioner should not now be heard to contend that its own post-receivership actions increased the compensation it was owed for the repudiation of the purchase option on the Riverfront Tract. See *FDIC* v. *Liberty Nat'l Bank & Trust Co.*, 806 F.2d 961, 965 (10th Cir. 1986) (recognizing that insolvency statutes such as 12 U.S.C. 1821(e) seek to "prevent new rights from arising" after the date of insolvency).[7]

c. Petitioner focuses much of its argument (Pet. 19-22) on alleged infirmities in the methods used by the FDIC's expert witness to determine the fair market value of the Riverfront Tract. Petitioner's argument is misdirected.

It was the task of the district court, as "gatekeeper" in evidentiary matters concerning expert testimony, to determine the admissibility of the testimony of the FDIC's appraisal expert. See *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147 (1999); *Daubert* v. *Merrill Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). If petitioner believed that some of that testimony should have been excluded, it should have raised those objections to the district court. Having failed to make such an objection, petitioner has waived any argument that the testimony was improperly admitted because based on

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[7] We note that this case does not involve a repudiation of the purchase option on the Beltway Tract. If the grantor of the purchase option on the Beltway Tract had gone into receivership before petitioner acquired the Beltway purchase option from PortAmerica, and if the FDIC later repudiated that purchase option, then an issue might arise as to whether an entity that acquires a purchase option to property after the date of receivership also acquires the right to damages under 12 U.S.C. 1821(e)(3) in the event of repudiation. This case, however, does not present that question.

"speculative and conjectural assumptions." Pet. 20-22. See Fed. R. Evid. 103(a)(1); *Willoughby* v. *Potomac Elec. Power Co.*, 100 F.3d 999, 1002 (D.C. Cir. 1996), cert. denied, 520 U.S. 1197 (1997); *Anderson* v. *Group Hospitalization, Inc.*, 820 F.2d 465, 469-470 (D.C. Cir. 1987); *Passaic Daily News* v. *NLRB*, 736 F.2d 1543, 1554 n.15 (D.C. Cir. 1984).[8]

Moreover, petitioner concedes (Pet. 10) that it was permitted to introduce its own expert testimony regarding the fair market value of the Riverfront Tract. The jury therefore heard expert testimony on the issue from both sides. It was the jury's task to evaluate the relative persuasiveness of the different experts' testimony and to arrive at a judgment as to the property's fair market value. The jury arrived at such a judgment, assessing the fair market value of the Riverfront Tract to be between the appraisals of the FDIC's expert and petitioner's expert. See Pet. 9-10.

3. Finally, petitioner asks this Court to grant certiorari in order to exercise its supervisory authority under Supreme Court Rule 10(a), contending that the court of appeals failed to address all issues raised by petitioner, demonstrated prejudice against petitioner in its remarks at oral argument, and committed factual errors in rendering its decision. Pet. 22-25. None of those assertions has merit.

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[8] In any event, the methods of the FDIC expert were unproblematic. The expert determined the general fair market value of the property, on the assumption that there was no relationship between the owner of the Beltway Tract and the owner of the Riverfront Tract and that the owners of each tract would cooperate with each other only to the extent it was in each owner's individual economic interest to do so. Petitioner identifies no decision of any court establishing that 12 U.S.C. 1821(e)(3)(A)(i) requires some other method of appraisal.

First, this Court grants the courts of appeals "wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). Cf. Fed. R. App. P. 36(a)(2) (recognizing that courts of appeals may render decisions without publishing an opinion). Second, the statement by one of the court of appeals judges during oral argument that the project had gone "in the toilet" (Pet. App. 45a-46a) was merely a colloquial reference to the admitted fact that the note on the Riverfront Tract was in default at the time the parties entered into the workout agreement. It does not establish prejudice on the part of the court of appeals. Third, any factual error made by the court of appeals concerning the provision in the purchase option agreement that petitioner could extend the option by making $2 million payments had no impact on the outcome of the case. The court of appeals upheld the district court's refusal of a jury instruction regarding the discounting of the option price because petitioner had not offered any evidence regarding the value of the asserted discount. *Id.* at 5a.[9]

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[9] Because the court of appeals based its decision on this point on the lack of any evidence regarding the amount of the discount rather than the uncertainty of the amount (see Pet. App. 5a), petitioner's assertion (Pet. 25) of a conflict with the D.C. Circuit's decision in *OPEIU* is incorrect. See *OPEIU*, 27 F.3d at 602. Moreover, even if there were a conflict with *OPEIU*, such intra-circuit conflicts are best resolved by the court of appeals concerned and generally do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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